

October 2, 2000

SUMMARY OF ENDANGERED SPECIES ACT ISSUES AND LITIGATION IN NEW MEXICO

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I. RIO GRANDE SILVERY MINNOW; CURRENT PENDING LITIGATION

A. *Middle Rio Grande Conservancy District v. Bruce Babbitt and the United States Fish and Wildlife Service, et al; State of New Mexico ex rel. The Office of the State Engineer, the New Mexico Interstate Stream Commission and the New Mexico Attorney General v. Bruce Babbitt, Secretary of the Interior and the United States Fish and Wildlife Service, et al.; Forest Guardians; Defenders of Wildlife; and Southwest Environmental Center v. Bruce Babbitt (Consolidated)*

- **Filed:** MRGCD and State of New Mexico's complaints filed August 4, 1999; environmental plaintiffs' complaint filed December 15, 1999
- **Relief sought:**
 - **MRGCD:** set aside designation critical habitat; injunction against implementation of the erroneous designation; and an order directing that the Defendants perform all obligations associated with the critical habitat designation, including those required by the National Environmental Policy Act, the Endangered Species Act, and the Administrative Procedures Act.
 - **State of New Mexico:** set aside designation of critical habitat and order the Secretary of the Interior to fully comply with the requirements of the National Environmental Policy Act, the Endangered Species Act, and the United States Constitution.
 - Require the preparation of an Environmental Impact Statement
 - Designate only areas that may require special management considerations or protection
 - Do not designate those areas where the benefits of exclusion outweigh the benefits of specifying the area as critical habitat unless the failure to designate the area as critical habitat will result in the extinction of the species
 - Specify physical or biological features which the critical habitat designation seeks to protect, make a determination that such features are essential and make a determination that the required features exist at specific locations
 - Designate critical habitat based on the best scientific data available
 - Cooperate with the State in designation of critical habitat and before acquiring any interest in water to conserve the minnow

- **Environmental Plaintiffs:** an order declaring that the Secretary failed to issue an adequate designation of critical habitat for the silvery minnow and compelling him to revise the critical habitat designation in a manner necessary to recover the silvery minnow
- Order allowing Forest Guardians and Defenders of Wildlife to participate as Amici Curiae filed October 26, 1999 (environmental plaintiffs' case was consolidated with the MRGCD/State of New Mexico consolidated case on February 4, 2000).
- Order allowing the New Mexico Farm and Livestock Bureau to intervene as a party filed December 1, 1999.
- Order allowing Joseph Skeen to participate as Amicus Curiae filed December 1, 1999.
- Administrative Record produced December 6, 1999, and supplemented on March 24, 2000.
- Order Granting Leave to File Amicus Brief of the Albuquerque Metropolitan Arroyo Flood Control Authority ("AMAFCA") filed January 3, 2000.
- Order granting City of Socorro's motion to intervene filed January 5, 2000.
- Order scheduling briefing on the Court's jurisdiction, Plaintiffs' standing and the merits filed on March 24, 2000.
- Plaintiffs filed briefs on jurisdiction on April 28, 2000. Defendants have responded and water plaintiffs replied on June 30, 2000.
- Plaintiffs filed briefs regarding standing on May 16, 2000; Defendants' response was filed June 30, 2000; Plaintiffs replied on July 24, 2000.
- Plaintiffs filed opening briefs on the merits on June 23, 2000; Defendants' Response is due October 6, 2000.
- A hearing on the merits will be set after October 16, 2000 of this year.

B. Rio Grande Silvery Minnow; Southwestern Willow Flycatcher; Defenders of Wildlife; Forest Guardians; National Audubon Society; New Mexico Audubon Council; Sierra Club; and Southwest and Environmental Center v. Eluid Martinez; Michael R. Gabaldon; Bureau of Reclamation; Gen. Joseph Ballard; Lt. Col. Tom Fallin; U.S. Army Corps of Engineers

- **Filed** November 15, 1999
- **Relief sought:** order to complete consultation on virtually all aspects of funding and operation of the middle Rio Grande Project and utilize authorities in furtherance of the purposes of the Endangered Species Act, i.e. avoid jeopardy/take and conserve the species; and an order to comply with NEPA by conducting an environmental impact statement relating to actions to increase the efficiency of the Middle Rio Grande Conservancy District irrigation system.
- Plaintiffs' Motion for Partial Summary Judgment filed on January 24, 2000.
- Defendants' answer filed January 25, 2000.
- Defendants' motion to strike plaintiffs' motion for partial summary judgment filed February 4, 2000; briefing complete.

- MRGCD's Motion to dismiss for lack of subject matter jurisdiction filed February 16, 2000; denied by Court Order filed July 19, 2000.
- Defendants' Motion to dismiss for failure to join the indispensable parties (Pueblos) filed March 20, 2000; denied by Court Order filed July 19, 2000.
- The State of New Mexico moved to intervene on June 12, 2000, which the Court granted on July 19, 2000. The State filed its Response to Preliminary Injunction on July 10, 2000 and its Answer on August 4, 2000.
- The City of Albuquerque's Motion to Intervene was granted on July 17, 2000.
- Motion for Preliminary Injunction filed by Plaintiffs on April 11, 2000.
 - Motion asks that Defendants be ordered to keep the Rio Grande wet, alleging that federal Defendants have discretion to take action to do so
 - Parties stipulated that the Motion not be briefed or heard until the Defendants give notice that river will dry.
 - The notice was filed on July 7, 2000 and the hearing on the Motion for Preliminary Injunction was set for July 24th, 2000.
 - The parties immediately began taking the depositions of the experts.
 - On July 18, 2000 the federal defendants moved for mandatory mediation, and after a hastily called telephonic hearing, Federal District Judge Parker ordered mediation in front of Magistrate DeGiacomo. The mediation took place in the Albuquerque Federal Courthouse from July 19 thru August 2, 2000 at which time the parties signed an agreed temporary order settling the preliminary injunction. Federal District Court Judge Parker signed and filed the Agreed Order on August 2nd, 2000.
 - Agreed Order, in summary, provides the following:
 - Compliance with State Law, federal law, and interstate stream compacts.
 - A temporary solution to achieve the goal of maintaining a continuous flow from Cochiti dam to the headwaters of Elephant Butte reservoir through October 31, 2000 and is the maximum supplemental water required the parties are required to contribute through December 31, 2000. However, there is an escape clause that allows any party to return to court for additional hearings if an emergency arises that threatens the survival of the minnow and there is not enough water to maintain continuous flows.
 - Pursuant to Court Order, plaintiffs and all defendants, except the Federal Defendants, submitted their proposal for a longer-term resolution to the Court in September pursuant to Court Order.
 - On August 23, 2000 the City of Albuquerque notified the Court that under then current conditions and water management, the supplemental water provided for under the August 2, 2000 Agreed Order would run out in September. Pursuant to an emergency provision in the Agreed Order the parties were back before Judge DeGiacomo on August 25, 2000.
 - A Mediation Conference before Judge DeGiacomo was held on September 11, 2000. Parties agreed to an amendment to the Agreed

Order providing additional water and, in summary, providing for the following:

- Compliance with State law and federal law
 - Additional pumps and modified pumping operations
- Federal Magistrate Molzen has been assigned to case scheduling, management and discovery.

II. RIO GRANDE SILVERY MINNOW; COMPLETED LITIGATION

A. *Forest Guardians and Defenders of Wildlife v. Bruce Babbitt*

- **Filed** April 2, 1997
- **Relief sought:** An order compelling the Secretary of the Interior to immediately issue a final decision on designation of critical habitat for the Rio Grande Silvery Minnow
- On February 22, 1999, the District Court ordered the Secretary of the Interior to publish a final critical habitat designation for the Rio Grande silvery minnow within 30 days
- The State of New Mexico and the Middle Rio Grande Conservancy District sought to intervene and set aside the court's order on February 24, 1999, and February 26, 1999, respectively; intervention was denied
- The State of New Mexico appealed the court's decision to deny intervention to the 10th Circuit Court of Appeals
- The case was dismissed with prejudice on October 16, 1999
- The State of New Mexico's appeal was dismissed as moot on December 8, 1999

B. *City of Albuquerque v. United States of America ex rel., Bruce Babbitt, the United States Department of the Interior, Eluid Martinez, and the United States Bureau of Reclamation*

- **Filed** September 1, 1999
- **Relief sought:** declaratory judgment that the water purchased by the City pursuant to the San-Juan-Chama Project Act and the San Juan-Chama Contract is the sole property of the City, and that the United States has no discretion or legal authority to allocate San Juan-Chama water for purposes beyond those enumerated and authorized pursuant to various compacts, laws, and contracts.
- Defendants' Motion to Dismiss filed December 1, 1999
 - No real and substantial controversy exists between the parties
 - Albuquerque's claims do not meet the jurisprudential test for ripeness
- Plaintiff's Response in Opposition to Motion to Dismiss filed February 7, 2000.
- Case dismissed on June 22, 2000

III. RIO GRANDE SILVERY MINNOW; LISTING

- Proposed listing published March 1, 1993
- Final rule listing the minnow as an endangered species published July 20, 1994
- No critical habitat designated at the time of the listing on the basis that the final designation was “not determinable”
- Fish and Wildlife Service failed to issue a final decision regarding designation of critical habitat by March 1, 1995, the date by which a decision was required by law
- Critical habitat designated by rule published July 6, 1999

IV. RIO GRANDE SILVERY MINNOW; INTERESTED PARTIES

A. Federal Agencies

- U.S. Fish and Wildlife Service
responsible for determining the status of species and determination of critical habitat
- U.S. Bureau of Reclamation
responsible for operations at certain federal reservoirs along the Rio Grande
- U.S. Army Corps of Engineers
responsible for operations at certain federal reservoirs along the Rio Grande

B. Other Interested Parties

- New Mexico Interstate Stream Commission
- New Mexico Office of the State Engineer
- New Mexico Dept. of Game and Fish
- Interested public, including environmental interest groups
- Tribes
- Municipalities using water from the Rio Grande
- Middle Rio Grande Conservancy District
- Other water users

V. RIO GRANDE SILVERY MINNOW; OUTSTANDING NOTICES OF INTENT TO SUE UNDER THE ENDANGERED SPECIES ACT

- City of Rio Rancho (November 29, 1999)
may intervene in the consolidated cases seeking compliance with the National Environmental Policy Act with respect to designation of critical habitat

VI. RIO GRANDE SILVERY MINNOW; OTHER ACTIVITIES OF INTEREST

- Programmatic Biological Assessment of Federal Discretionary Actions Related to Water Management on the Middle Rio Grande, New Mexico, issued October 1999
 - On September 22, 2000 the State learned that the BA had been “shelved”.
- Upper Rio Grande Water Operations Review and Environmental Impact Statement; U.S. Army Corps of Engineers, Bureau of Reclamation and the New Mexico Interstate Stream Commission are joint lead agencies
- Collaborative processes
 - The Rio Grande Silvery Minnow ESA Work Group made a funding request through Senator Domenici for approximately \$1.2 million
 1. RGSM transplant and study
 2. evaluation of fish passages and diversion structure alternatives
 3. restoration projects
 4. full-time coordinator for the MRG collaborative process
 5. other uses as designated by the ESA Work group.
- Green and White Papers Group

VII. PECOS BLUNTNOSE SHINER; CURRENT PENDING LITIGATION

A. *Forest Guardians v. U.S. Army Corps and Bureau of Reclamation*

- **Filed** May 23, 2000
- **Relief sought:** an order declaring the Corps and Reclamation are in violation of the ESA and ordering Defendants to comply with the ESA and APA, to utilize authorities in furtherance of the purposes of the Endangered Species Act, i.e. avoid jeopardy/take and conserve the species. (The plaintiff’s claims in this case are similar to the plaintiffs’ claims in *Minnow v. Martinez*. See I.B, above.) Specifically, the plaintiffs want a minimum 35 cfs flow at “near Acme Gauge” on the Pecos River.
- An Initial Scheduling Order was entered by the Court setting an August 28, 2000 deadline for parties to meet and confer on a Discovery plan; a September 11, 2000 deadline for submission of a Discovery plan and submission of an Initial Pre-Trial Report; and setting a scheduling conference on September 20, 2000.
- Parties and non-parties participated in voluntary mediation before Judge DeGiacomo on September 25, 2000.
- An Agreed Order is in the works. The Agreed Order provides in part:
 - Compliance with State and Federal law

- U.S. will enter into an agreement with the Fort Sumner Irrigation District (“FSID”) to pay irrigators to refrain from irrigating for the remainder of this irrigation season
- Plaintiffs will not file any request for emergency relief
- State of New Mexico is not a party but is participating in mediation and will be moving to intervene in this case.

VIII. PECOS BLUNTNOSE SHINER; LISTING

- Proposed listing published May 11, 1984
- Final rule listing the shiner as a threatened species effective March 23, 1987
- Critical habitat designated at the time of the listing

IX. PECOS BLUNTNOSE SHINER; RELATED ACTIVITIES

- Research Memorandum of Understanding
 - a. Initial five-year study period commenced January 1992
 - b. Three-year extension of the cooperative working relationship
- Pecos Programmatic Water Operations EIS; New Mexico Interstate Stream Commission and the Bureau of Reclamation are joint lead agencies.

X. COLORADO RIVER ENDANGERED SPECIES ACT LITIGATION

A. Defenders of Wildlife et al. v. Babbitt et al.

- **Filed** June 28, 2000 in the D.C. District Court pursuant to Notice of Intent to Sue described in section XI.A, below.
- **Relief sought:** an order declaring Reclamation, Fish & Wildlife Service, and the National Marine Fisheries Service are in violation of the ESA and ordering Defendants to comply with the ESA and APA, to utilize authorities in furtherance of the purposes of the Endangered Species Act, i.e. consult on activities within the United States which may impact endangered species in Mexico, consult on impacts beyond 5-year period, avoid jeopardy/take and conserve the species.
- The Plaintiffs allege that Reclamation has the authority to take actions that would result in the dedication of Colorado River water for the Colorado River Delta in Mexico.
- It is New Mexico’s understanding that the Lower Colorado River Basin States and water interests have moved to intervene in this case.
- State of New Mexico and the other Upper Colorado River Basin States are considering intervening in this case

XI. OTHER NOTICES OF INTENT TO SUE UNDER THE ENDANGERED SPECIES ACT

- A. American Humane Association, Asociacion Ecologica de Usuarios del Rio Hardy-Colorado, Biodiversity Legal Foundation, Bradshaw Mountain Wildlife Association, Center for Biological Diversity, Centro Regional de Estudios Ambientales y Socioeconomicos, Defenders of Wildlife, Earth Island Institute, El Centro de Derecho Ambiental e Integracion Economica del Sur, A.C., El Centro de Estudios de Desierto y Oceanos, Forest Guardians, the Humane Society of the United States, In Defense of Animals, Sierra Club, Southwest Toxic Watch (December 14, 1999)
- notice of intent to sue the U.S. Bureau of Reclamation, U. S. National Marine Fisheries Service, National Oceanic and Atmospheric Administration, U.S. Department of Commerce, U.S. Department of State, U.S. section of the International Boundary and Water Commission and the U.S. Army Corps of Engineers regarding the effects of agency operations along and oversight of the lower Colorado River on threatened and endangered species and critical habitat the notice of intent relates to the following threatened or endangered species: Colorado squawfish, humpback chub; bonytail chub; razorback sucker, Yuma clapper rail, Southwestern willow flycatcher, brown pelican, bald eagle, and peregrine falcon
- B. Center for Biological Diversity (November 17, 1999)
Notice of intent to sue the U.S. Bureau of Reclamation for failure to conserve the southwestern willow flycatcher and failure to consult with respect to operations of Hoover Dam on southwestern willow flycatchers at the Lake Mead Virgin River Delta